IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION Securities, Derivative & "ERISA" Litigation	§ § §	MDL Docket No. 1446
MARK NEWBY, et al., Plaintiffs,	§ §	
vs.	§ § §	Civil Action No. H-01-3624 And Consolidated Cases
ENRON CORPORATION, et al., Defendants.	§ § §	

THE FINANCIAL INSTITUTION DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION

1788

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

Defendants Bank of America Corporation, Banc of America Securities LLC, Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Canadian Imperial Bank of Commerce, CIBC World Markets Corp. (f/k/a CIBC Oppenheimer Corp.), CIBC World Markets, plc, Citigroup, Inc., Citibank, N.A., Salomon Smith Barney, Inc. (now called Citigroup Global Markets Inc.), Salomon Brothers International Limited, Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation), Credit Suisse First Boston (USA), Inc., Pershing LLC, J.P. Morgan Chase & Co., JPMorgan Chase Bank, JPMorgan Securities Inc., Lehman Brothers Inc., Lehman Brothers Holdings Inc., Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith, Incorporated (collectively, the "Financial Institution Defendants"), respectfully submit this memorandum of law in opposition to Lead Plaintiff's Amended Motion for Class Certification.

Preliminary Statement

This case is one of the largest, most complicated securities fraud lawsuits in history, arising from one of the largest bankruptcies in history. The scope of the lawsuit alleged in Lead Plaintiff's First Amended Consolidated Complaint (cited herein as "Am. Compl.")—not to mention the hundreds of other lawsuits spawned by Enron's bankruptcy—is daunting. It purports to be brought on behalf of thousands, if not tens of thousands, of purchasers of more than fifteen different securities over a more than three-year period. It alleges that more than 60 different defendants violated the securities laws as part of a massive scheme to defraud that purportedly rendered over 200 separate and distinct statements about Enron, made at different times by different entities, materially false and misleading for dozens of different reasons.

Even under Lead Plaintiff's allegations, however, the various defendants had very different relationships with Enron that changed over time. Those relationships concerned separate aspects of Enron's business that were represented to different investors through distinct public and non-public statements. Consequently, different members of the putative class have different claims against different defendants—including different Financial Institution Defendants—depending on when they purchased which Enron securities (or other securities) and on what they relied. Lead Plaintiff seeks to lump together, in one undifferentiated class, dozens of separate classes of purchasers that were allegedly defrauded at different times and in different ways by different subsets of defendants with regard to a wide variety of different securities.

Nevertheless, in its amended motion for class certification, Lead Plaintiff asserts that this case "exemplifies what Rule 23 envisions for class treatment." (Lead Pl.'s Am. Mot. for Class Cert. at 2.) But Rule 23 contemplates certification of a cohesive class—not the jumbled, heterogeneous class Lead Plaintiff seeks to certify. As demonstrated below, Lead Plaintiff has not satisfied its burden of showing that the class alleged meets the requirements of Rule 23.

First, using Lead Plaintiff's definition of the class, individual issues of reliance overwhelm issues that are common to the putative class. Lead Plaintiff's claims against the Financial Institution Defendants, as the Court has previously noted, are not typical securities fraud claims involving misstatements disseminated into an efficient securities market. Instead, those claims are premised on actions by the Financial Institution Defendants through which they allegedly participated in Enron's fraudulent scheme. As each Financial Institution Defendant has previously argued, that conduct is not actionable under Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). In Central Bank, the Supreme Court held that this type of conduct is not actionable because, among other reasons, plaintiffs generally do not rely on the conduct of secondary actors in making their investment decisions. See id. at 180. Here, Lead Plaintiff asks the Court nonetheless to presume, based on the "fraud-on-the-market" presumption, that all members of the putative class relied on the alleged actions of all the

Financial Institution Defendants. That alleged conduct—as the proposed class representatives themselves confirmed in their depositions—was not conveyed to investors and the market. Accordingly, under the Supreme Court's decision in Basic Inc. v. Levinson, 485 U.S. 224 (1988), the presumption of reliance is inapplicable. To prove their Section 10(b) claims against the various Financial Institution Defendants, individual plaintiffs must come forward and prove that they specifically relied on the particular conduct of each Financial Institution Defendant (i.e., on the particular transactions through which Lead Plaintiff contends each Financial Institution Defendant allegedly violated the securities laws). Under these circumstances, it is well-settled that the predominance requirement has not been satisfied. (See infra Part II.)

Second, using Lead Plaintiff's definition of the class, Rule 23(b)(3)'s superiority requirement has not been met. Given the scope of this lawsuit, there are countless different factual and legal issues that must be addressed with respect to each defendant. As defined by Lead Plaintiff, the undifferentiated mass of purchasers and claims that are swept into the putative class present insurmountable manageability problems. Indeed, it is difficult to envision a way in which this case as presently described by Lead Plaintiff could be tried, if at all, without compromising both defendants' due process rights and absent plaintiffs' rights to fair representation. Smaller actions, by contrast, can identify discrete groups of plaintiffs and claims against specific sets of defendants that can avoid these dangers. Thus, the massive and unwieldy class action proposed by Lead Plaintiff is not superior to smaller, more particularized actions. (See infra Part III.)

Third, if a class is certified, the proposed class period alleged against the Financial Institution Defendants cannot start on October 19, 1998, and end on November 27, 2001, as Lead Plaintiff requests. On the front end, the class period alleged against the Financial

Institution Defendants can begin no earlier than April 8, 1999, because (as the Court has already held) any claims based on purchases made before that time—which is three years before any claim was alleged against the Financial Institution Defendants—are time-barred. On the back end, the class period should end no later than October 16, 2001, when, according to Lead Plaintiff, Enron "shocked the markets" by announcing that it had overstated its financial condition by over $1 billion. (See infra Part IV.)

Fourth, Lead Plaintiff's claims under Section 12(a)(2) cannot be certified because not a single proposed class representative bought the securities that are the subject of those claims. Since no proposed class representative bought those securities, there is no one with standing to represent a class of purchasers pursuing those claims. Moreover, the one intervenor—whose intervention the Financial Institution Defendants have challenged, and who, in any event, is not a typical and adequate class representative—only purchased one of the securities in one of the nine offerings that are the subject of Lead Plaintiff's Section 12(a)(2) claims. Thus, at most, the putative class has standing to pursue claims arising from that single offering, and all claims brought on behalf of purchasers in the other eight offerings cannot be certified. And, even if a class is certified, separate subclasses should be created for each of the nine offerings that is the subject of Lead Plaintiff's Section 12(a)(2) claims, each of which would need a representative with standing. (See infra Part V.)

Fifth, Lead Plaintiff's Section 11 claims—which add yet another layer of complexity to this lawsuit—cannot be certified as defined by Lead Plaintiff. As explained below, Section 11 plaintiffs that purchased certain of the securities that are the subject of Lead Plaintiff's Section 11 claims after Enron filed its Form 10-Ks for 1999 and 2000 must prove reliance and cannot be certified as a class. Further, if a class is certified, separate subclasses should be created for each of the three offerings (and for those purchasers who must prove reliance, and those who do not need to prove reliance). (See infra Part VI.)[1]

Argument

I. LEAD PLAINTIFF HAS THE BURDEN OF DEMONSTRATING THAT THE ALLEGED CLASS SHOULD BE CERTIFIED.

A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class. See Stirman v. Exxon Corp., 280 F.3d 554, 561 (5th Cir. 2002); Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996). "[C]onsideration of class certification should proceed on a claim by claim basis, with reference to the statutory elements of and remedies for each claim." Patterson v. Mobil Oil Corp., 241 F.3d 417, 419 (5th Cir. 2001). Critically, "[t]he party seeking certification bears the burden of demonstrating that the rule 23 requirements have been met." Stirman, 280 F.3d at 561; Castano, 84 F.3d at 740.

The unique facts of each case are generally the determining factors governing certification. See Alabama v. Blue Bird Body Co., 573 F.2d 309, 316 (5th Cir. 1978). Where, as here, a plaintiff includes in its motion claims that are inappropriate for certification, the court should decline to certify those particular claims. See Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) (finding that the court should "treat[] each claim individually and certify[] the class with respect to only those claims for which certification is appropriate"). While plaintiffs need not prove the merits of their claim at the certification stage, this principle should not be "talismanically invoked to artificially limit a trial court's examination of the

[1] In the Outside Directors' Memorandum Concerning Certification of Class Claims Under Section 11, the Outside Director Defendants appear to concede that certification of "tailored classes" is appropriate in this action. The Outside Director Defendants, however, are in a different position from the Financial Institution Defendants, and we respectfully disagree that the Court should certify a few large classes that do not differentiate among defendants and do not take into consideration the variety of different transactions with which each was allegedly involved at various times throughout the class period.

factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements." Castano, 84 F.3d at 744 n.17 (quoting Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984)); accord B & B Advisory Servs., L.L.C. v. Bombardier Aerospace Corp., No. Civ. A. 02-2695, 2003 WL 22038381, at *3 (E.D. La. Aug. 22, 2003). If problems are apparent at the outset, a court may not rely on plaintiffs' promises or assumptions that problems with predominance or superiority can be resolved during the litigation. See Castano, 84 F.3d at 742. As we demonstrate below, in light of these well-established legal principles, certification of the class defined by Lead Plaintiff is inappropriate.

II. THE CLASS DEFINED BY LEAD PLAINTIFF CANNOT BE CERTIFIED BECAUSE INDIVIDUAL ISSUES OF RELIANCE PREDOMINATE OVER COMMON QUESTIONS.

Rule 23(b)(3)—the only subsection of Rule 23(b) under which Lead Plaintiff seeks to certify the putative class with respect to the claims asserted against the Financial Institution Defendants—requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members". Fed. R. Civ. P. 23(b)(3). The predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997); see also Smith v. Texaco, Inc., 263 F.3d 394, 409 (5th Cir. 2001) ("The predominance inquiry involves a comparison of the issues common among the class members and the issues individual to them."). In determining whether this test is met, courts may not simply assume that common issues predominate because those issues would play a part in every trial. See Castano, 84 F.3d at 744-45. Instead, the court must look beyond the pleadings to determine whether Rule 23's requirements have been satisfied. See id. at 744. Here, class treatment is inappropriate for the class defined by Lead Plaintiff because individual issues of reliance overwhelm common questions.

"Reliance is one of the cornerstones of a Rule 10b-5 claim." Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 358 (5th Cir. 1987); see also Nathenson v. Zonagen Inc., 267 F.3d 400, 413 (5th Cir. 2001); Young v. Nationwide Life Ins. Co., 183 F.R.D. 502, 507 (S.D. Tex. 1998).[2] "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." Basic, 485 U.S. at 243. Thus, as the Supreme Court noted in Central Bank, to prove that a secondary actor violated Section 10(b) plaintiffs must show that they specifically relied on the "statements or actions" of that secondary actor. Central Bank, 511 U.S. at 180. Where "proof of individualized reliance from each member of the proposed plaintiff class" is required, the law is well-settled that plaintiffs are precluded "from proceeding with a class action, since individual issues then would have overwhelmed the common ones." Basic, 485 U.S. at 242; see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 211 (5th Cir. 2003) ("Fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate."); Castano, 84 F.3d at 745 ("According to both the advisory committee's notes to Rule 23(b)(3) and this court's decision in Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973), a fraud class action cannot be certified when individual reliance will be an issue.").

[2] Lead Plaintiff alleges claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, against all Financial Institution Defendants except Bank of America Corp. and Banc of America Securities LLC. (See Am. Compl. ¶ 993.)

In a typical securities fraud lawsuit involving misstatements, "reliance could be rebuttably presumed with respect to publicly disseminated materially misleading statements concerning companies whose shares are traded on a well-developed, efficient market." Nathenson, 267 F.3d at 413. As the Supreme Court explained in Basic, the "fraud-on-the-market" presumption of reliance is based on the fact that, "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." Id. at 247 (involving "three public statements made by Basic").

The Enron litigation is not a typical securities fraud case involving alleged misstatements by the Financial Institution Defendants disseminated into an efficient market. Rather, as the Court noted in denying portions of certain Financial Institution Defendants' motions to dismiss, plaintiffs' theory of recovery against the Financial Institution Defendants is both "novel" and "controversial". In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 565 (S.D. Tex. 2002). For purposes of the motions to dismiss, the Court ruled that certain Financial Institution Defendants could be primarily liable under Section 10(b) even though they are not alleged to have made the purported material misstatements in Enron's financial statements because:

> "[U]nder Rule 10b-5(a) and (c), where a group of Defendants allegedly participated in the scheme to defraud the public and enrich themselves in connection with the purchase or sale of securities, any Defendant that itself, with the requisite scienter, actively employed a significant material device, contrivance, scheme, or artifice to defraud or actively engaged in a significant, material act, practice, or course of business that operated as a fraud or deceit upon any person in connection with the purchase or sale of any security may be primarily liable."

In re Enron, 235 F. Supp. 2d at 693. As the Financial Institution Defendants have previously argued, this interpretation of Section 10(b)'s "manipulative or deceptive device or contrivance" language improperly expands secondary actor liability, and is contrary to the Supreme Court's holding in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), that "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act" and does not "create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute." 511 U.S. at 177-78.

Leaving aside the fact that this novel theory of liability is inconsistent with Central Bank and its progeny, plaintiffs' claims against the Financial Institution Defendants based on that legal theory cannot be certified as a class action. In Lead Plaintiff's amended motion for class certification, the Regents asserts that the predominance requirement is satisfied because "Enron's and Enron-related entities' publicly traded securities all traded in an efficient market" and "publicly available information about the Company was quickly incorporated into the price for these securities". (Lead Pl.'s Am. Mot. for Class Cert. at 26.) If this were a suit against Enron—the maker of all the allegedly false and misleading statements—Lead Plaintiff's argument would be understandable. But the specific conduct for which plaintiffs seek to hold the Financial Institution Defendants liable was not conveyed to the market. Whether that alleged conduct took the form of investing in the LJM Partnerships, structuring a transaction with Enron or lending money to Enron, that conduct was generally unknown to investors and the market. Since the challenged conduct of the Financial Institution Defendants was not known to the market, it cannot be presumed that Enron's investors relied upon that conduct. Only Enron or others that made public statements to the market could presumptively have affected plaintiffs' investment decisions on a classwide basis. Accordingly, the "fraud-on-the-market" presumption of reliance is not applicable here. See Basic, 485 U.S. at 247 (presumption of reliance applies to "any public material misrepresentations"); Nathenson, 267 F.3d at 413 (same).[3]

This result is consistent with the Supreme Court's holding in Central Bank, and was confirmed during class discovery by the proposed class representatives themselves. First, in deciding that aiding and abetting conduct was not actionable under Section 10(b), the Supreme Court reasoned that such conduct could not be actionable because that would "allow[] plaintiffs to circumvent the reliance requirement". Central Bank, 511 U.S. at 180. That is exactly what Lead Plaintiff asks the Court to do here. Lead Plaintiff seeks to hold each Financial Institution Defendant liable for its alleged conduct in dozens of different Enron-related transactions that involved different Financial Institution Defendants at different times during the proposed three-year class period. The precise role each of the Financial Institution Defendants allegedly played in those transactions, however, was generally unknown to investors and could not have been relied upon by them in their investment decisions. There is thus no basis to presume, as Lead Plaintiff suggests, that all plaintiffs relied on all of the Financial Institution Defendants at all relevant times during the alleged class period—regardless of when each plaintiff purchased Enron securities, which Enron financial statements were affecting the market at the time, and

[3] In response, Lead Plaintiff may seek to rely on the Fifth Circuit's decisions in Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981), and Finkel v. Docutel/Olivetti Corp., 817 F.2d 356 (5th Cir. 1987), two pre-Basic and pre-Central Bank cases that held that a plaintiff may "assert a fraud on the market theory under 10b-5(1) and (3) but not under 10b-5(2)." Finkel, 817 F.2d at 362-63. Neither case, however, stands for the proposition that reliance may be presumed where a secondary actor's conduct is not directly communicated to an efficient market. In Shores, the defendants allegedly conspired to market securities that were not marketable under the securities laws to investors. Thus, any investor who purchased those securities necessarily relied on the defendants' conduct. See Shores, 647 F.2d at 463-64 & n.2. In Finkel, the scheme to defraud involved the actions of a parent and its subsidiary, and was not conducted through any intervening market actors. See Finkel, 817 F.2d at 362-63.

what transactions allegedly conducted with which Financial Institution Defendants allegedly affected those statements.

Even if the Financial Institution Defendants' actions were allegedly part of Enron's scheme, that does not mean that plaintiffs relied on those actions. Rather, there must be a separate "showing that the plaintiff[s] relied upon the aider and abettor's statements or actions." Id. It would be unprecedented simply to presume that that showing has been made by all members of the putative class based on the legal theory of liability advanced by Lead Plaintiff here. Indeed, if the Court were to presume reliance under Lead Plaintiff's theory, putative class members who have never even heard of the Financial Institution Defendants, let alone based their investment decisions on any of the Financial Institution Defendants' actions, would be relieved from proving the element of reliance—essentially creating claims against the Financial Institution Defendants where none would otherwise exist.[4]

For the same reasons, it is improper to presume that Section 10(b)'s requirement that the alleged fraud be "in connection with the purchase or sale of any security" is satisfied on a classwide basis with respect to the Financial Institution Defendants. As this Court recently noted in its decision on the motions to dismiss in the Tittle action, there must be "some kind of 'nexus between the alleged fraud and a securities transaction'" to satisfy the "in connection with" element. In re Enron Corp. Sec., Derivative & ERISA Litig., No. MDL 1446, Civ. A. H-01-

[4] As an alternative to the "fraud-on-the-market" presumption, Lead Plaintiff may seek to rely on the presumption of reliance based on alleged omissions articulated by the Supreme Court in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)—a presumption of reliance that is neither pled in the Amended Complaint nor relied upon in Lead Plaintiff's Amended Motion for Class Certification. That presumption of reliance does not apply here. Lead Plaintiff's case is not based solely on omissions, but instead focuses on the alleged misrepresentations contained in Enron's financial statements. Under these circumstances, the Affiliated Ute presumption of reliance is plainly inapplicable. See Cox v. Collins, 7 F.3d 394, 395-96 (4th Cir. 1993); In re Infocure Sec. Litig., 210 F. Supp. 2d 1331, 1350 (N.D. Ga. 2002).

3913, 2003 WL 22245394, at *85 n.125 (S.D. Tex. Sept. 30, 2003) (citation omitted). Here, the transactions through which each Financial Institution Defendant allegedly participated in the alleged Enron fraudulent scheme took place at different times throughout the asserted class period and allegedly affected different statements read by different plaintiffs in different ways. Thus, it cannot be presumed that the alleged transactions for which the Financial Institution Defendants are allegedly liable were "interdependent and coincidental" with all plaintiffs' purchases, and the requisite "nexus" required to satisfy the "in connection with" requirement is absent. See In re Enron, 2003 WL 22245394, at *81 n.121. Accordingly, common questions do not predominate over individual issues.

Second, the proposed class representatives' testimony demonstrates that it is not appropriate to presume that all putative class members relied upon the non-public conduct of the Financial Institution Defendants. During class discovery, the proposed class representatives confirmed that the Financial Institution Defendants did not make any express representations to them; rather, their complaint is that the Financial Institution Defendants "enabled", "assisted" or "helped perpetuate" Enron's fraudulent conduct. (See, e.g., Schuette Dep. at 124-29 (Baily Decl. Ex. 14); Placke Dep. at 98-102, 126 (Baily Decl. Ex. 12); Sarno Dep. at 229-30 (Baily Decl. Ex. 13); Speck Dep. at 218-21 (Baily Decl. Ex. 15); Atkins Dep. at 74-76 (Baily Decl. Ex. 1); Cassidy Dep. at 159-69 (Baily Decl. Ex. 3); Kimmerling Dep. at 122-28 (Baily Decl. Ex. 9); Henning Dep. at 174-76 (Baily Decl. Ex. 6); John Dep. at 40-41 (Baily Decl. Ex. 7); Mayo Dep. at 96, 153-55 (Baily Decl. Ex. 10); Chun Dep. at 69 (Baily Decl. Ex. 4); Wilberg Dep. at 138-39 (Baily Decl. Ex. 16); Zegarski Dep. at 102 (Baily Decl. Ex. 17); Kennett Dep. at 135-39, 141-44

(Baily Decl. Ex. 8); Bobbs Dep. at 216 (Baily Decl. Ex. 2).)[5] In addition, most of the proposed class representatives testified that they had no contact at all with the Financial Institution Defendants and did not rely on anything the Financial Institution Defendants said or did in making their investment decisions. (See, e.g., Schuette Dep. at 128-29 (Baily Decl. Ex. 14); Placke Dep. at 100-02, 126 (Baily Decl. Ex. 12); Speck Dep. at 220-21 (Baily Decl. Ex. 15); Atkins Dep. at 74-76 (Baily Decl. Ex. 1); Cassidy Dep. at 165-69 (Baily Decl. Ex. 3); Henning Dep. at 174-76 (Baily Decl. Ex. 6); Kimmerling Dep. at 126-27 (Baily Decl. Ex. 9); Chun Dep. at 68 (Baily Decl. Ex. 4); Wilberg Dep. at 138 (Baily Decl. Ex. 16); Zegarski Dep. at 102-03 (Baily Decl. Ex. 17); Kennett Dep. at 135-39, 141-44 (Baily Decl. Ex. 8); Bobbs Dep. at 216 (Baily Decl. Ex. 2).) Indeed, Dr. Mayo, one of the proposed class representatives, testified that he was not "injured through the actions of the bank defendants" in particular. (Mayo Dep. at 153 (Baily Dec. Ex. 10).) If the proposed class representatives selected by Lead Plaintiff did not rely on the Financial Institution Defendants' conduct, it should not be presumed that the absent members whom they purport to represent did rely. Rather, to prove their claims against the Financial Institution Defendants, each member of the putative class must individually establish that he or she relied on each Financial Institution Defendant's conduct.[6] Thus, under Lead

[5] We have attached certain documents and testimony as exhibits to the Declaration of Melissa J. Baily, dated October 22, 2003, and filed herewith. Those materials are cited in this memorandum as "Baily Decl. Ex. __".

[6] That this inquiry requires individual determinations of reliance was made plain during the depositions of the proposed class representatives. For example, Jeffrey Heil testified that the Regents had non-public discussions with senior Enron management, and based its decision to acquire Enron securities, at least in part, on those private conversations. (Heil Dep. at 35-38, 58-59, 90-91, 134-35, 222 (Baily Decl. Ex. 5).) Thus, the Regents is subject to the unique defense that it did not rely on the conduct of the Financial Institution Defendants, or on public information generally, when it purchased Enron securities. See In re Firstplus Fin. Group, Inc. Sec. Litig., No. Civ. A. 3:98-CV-2551-M, 2002 WL 31415951, at *5 (N.D. Tex. Oct. 28, 2002); Grace v. Perception Tech. Corp., 128 F.R.D. 165, 169 (D. Mass. 1989). Similarly, several of the proposed class representatives bought after October 16, 2001, when Enron "shocked the

Plaintiff's theory of liability, individual issues of reliance overwhelmingly predominate over common questions, and the predominance requirement is not satisfied.[7]

III. THE CLASS ACTION DEFINED BY LEAD PLAINTIFF SUFFERS FROM DISQUALIFYING MANAGEABILITY PROBLEMS.

In addition to the predominance requirement, Rule 23(b)(3) also requires that maintenance of a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether to certify a class, courts should bear in mind that "class certification skews trial outcomes and 'creates insurmountable pressure on defendants to settle, whereas individual trials would not.'" Griffin v. GK Intelligent Sys., Inc., 196 F.R.D. 298, 305 (S.D. Tex. 2000) (quoting Castano, 84 F.3d at 746); see also Castano, 84 F.3d at 746 ("Class certification magnifies and strengthens the number of unmeritorious claims."); In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165-66 (2d Cir. 1987).

---

markets" by announcing that it had overstated its financial condition by over $1 billion. (See Jaconette Decl. Ex. 6 (Amalgamated Bank); Jaconette Decl. Ex. 15 (San Francisco); Jaconette Decl. Ex. 23 (Stephen Smith).) These plaintiffs are also subject to the unique defense that they did not rely on the alleged fraud. See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 179 (2d Cir. 1990); In re Safeguard Scientifics, 216 F.R.D. 577, 582 (E.D. Pa. 2003).

[7] For purposes of the motions to dismiss, the Court ruled that plaintiffs properly alleged the "fraud-on-the-market" presumption of reliance. See In re Enron, 235 F. Supp. 2d at 693. Given that the Financial Institution Defendants' conduct was neither conveyed to the market nor relied upon by the proposed class representatives, it is now clear that the presumption of reliance is inapplicable here (or, at a minimum, has been rebutted). See Basic, 485 U.S. at 248 ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."). In any event, the Court's inquiry into the merits of Lead Plaintiff's lawsuit is more rigorous during the class certification stage than during the motion to dismiss stage. See Stirman, 280 F.3d at 561; Castano, 84 F.3d at 740, 744 & n.17. Here, the Court must look beyond the pleadings to determine whether the predominance test has been satisfied. See Stirman, 280 F.3d at 561; Castano, 84 F.3d at 740, 744 & n.17.

Notably, "[t]he greater the number of individual issues, the less likely superiority can be established." Castano, 84 F.3d at 745 n.19; In re Am. Med. Sys., 75 F.3d 1069, 1084-85 (6th Cir. 1996); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998) ("The predominance of individual-specific issues relating to the plaintiffs' claims [on the reliance issue] in turn detracts from the superiority of the class action in resolving these claims."). Thus, where "extensive manageability problems" would confront the court if a class were to be certified, class certification is not appropriate. Castano, 84 F.3d at 747; Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632-33 (3d Cir. 1996); In re Hotel Tel. Charges, 500 F.2d 86, 90-92 (9th Cir. 1974).

Here, as the Court is undoubtedly aware, the Enron litigation poses severe manageability problems. This litigation is among the largest and most complicated securities class action lawsuits in history. Lead Plaintiff's Amended Complaint alone consists of 1016 numbered paragraphs, many of which have more than 25 subparts, spanning 646 pages. It describes more than three years of Enron's history. It names over 65 defendants (plus their affiliates). It purports to recite approximately 225 separate and distinct allegedly false and misleading statements made by those defendants (and other entities) before and during the more than three-year alleged class period. It identifies dozens of transactions through which the defendants allegedly participated in Enron's overarching scheme to defraud. It lists 29 different securities offerings underwritten by different combinations of defendants. It alleges claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, under Sections 11 and 15 of the Securities Act of 1933 (in connection with four securities offerings), under Sections 12 and 15 of the Securities Act of 1933 (in connection with nine securities offerings), and under Article 581-33(A)(2) of the Texas Securities Act (in connection with two securities offerings).

The Amended Complaint generally alleges that each of the 65 defendants "engaged or participated in the implementation of manipulative devices to inflate Enron's reported profits and financial condition, made or participated in the making of false and misleading statements and participated in a scheme to defraud or a course of business that operated as a fraud or a deceit on purchasers of Enron's publicly traded securities between 10/19/98 and 11/27/01." (Am. Compl. ¶ 2 (emphasis in original).) Throughout the three-year alleged class period, however, the defendants—particularly the Financial Institution Defendants—each touched Enron in different ways, at different times, in connection with different transactions that allegedly impacted different Enron financial statements. Moreover, the putative class purports to include thousands of investors that purchased and sold Enron debt and equity securities at different times during the alleged class period. Those investors, depending upon when they invested, relied on very different information that was allegedly influenced by the actions of different defendants at different times.[8]

For example, Joseph Speck, one of the proposed class representatives, testified that he bought Enron securities in reliance on statements in August 2000 made by Enron and its officers concerning Enron Broadband Services ("EBS"). (Speck Dep. at 36-39, 123-25 (Baily Decl. Ex. 15).)[9] He did not rely on Enron's financial statements, nor did he rely on anything the Financial Institution Defendants said or did. (Id. at 125-26, 220-21 (Baily Decl. Ex. 15).) Accordingly, to prove his claims, he (and all plaintiffs like him) must establish, among other

[8] Indeed, the Amended Complaint contains a timeline of alleged events from July 31, 1998, through March 4, 2002, that provides a glimpse of the number and complexity of the issues in this action. (Am. Compl. ¶ 74.)

[9] The Regents also based its investment decisions in large part on information about EBS. As Jeffrey Heil testified, EBS was one of the main aspects of Enron's business that led the Regents to invest in Enron, and was the "single most" significant factor in the Regents' decision to maintain its investment in Enron. (Heil Dep. at 89-90, 129-30, 159, 274 (Baily Decl. Ex. 5).)

things: (1) the falsity of the statements about EBS on which he relied; (2) which defendants were involved with making those statements about EBS; (3) that those particular defendants acted with scienter; and (4) whether his losses were caused by the alleged misstatements. See In re Enron, 235 F. Supp. 2d at 571.

Moreover, there will invariably be some defendants that were not in any way involved with EBS; indeed, there will be some defendants who had no, or very limited, contact with Enron at all during 2000 and 2001 (when EBS existed). Thus, on top of the already complicated inquiry that must be undertaken concerning alleged misstatements and transactions about EBS, the jury is faced with the impossible task at trial of sifting the evidence against defendants who were involved with EBS from the evidence against defendants who were not. This example is particularly meaningful with respect to the Financial Institution Defendants, none of which is alleged to have had any involvement whatsoever with the management of EBS, let alone any statements by Enron regarding EBS. Thus, under any theory, they cannot be liable for Enron's statements pertaining to EBS. Nevertheless, if the Financial Institution Defendants are tried together with all the other defendants, and the jury hears evidence against those defendants concerning EBS or any other transactions with which the Financial Institution Defendants were not involved, there is a real risk that the jury's deliberations about the Financial Institution Defendants will be unduly influenced by evidence concerning EBS or other transactions irrelevant to plaintiffs' claims against the Financial Institution Defendants.

This one example illustrates the sheer number and complexity of issues that must be addressed for every single one of the hundreds of different statements and transactions at issue. The inquiry is even more complicated with respect to Enron's financial statements, which are much more complex than a single statement about a single line of business, and were allegedly impacted by different defendants and transactions in different ways at different times.[10] Simply put, Lead Plaintiff's kitchen-sink lawsuit has created massive manageability problems that would hopelessly confuse a jury if plaintiffs were to attempt to try all at once all the different claims against all defendants for all alleged securities law violations.[11]

Notably, we could find no other securities lawsuit where the number of claims, statements, defendants and transactions even approached that which is at issue here—let alone a case that was certified as a class action. Cases far less complex, however, have been denied class treatment due to manageability problems. For example, in Carpenter v. BMW of North America, Inc., plaintiff sued BMW for "engag[ing] in a scheme to defraud purchasers through written misrepresentations regarding certain 1999 BMW 3 and 5 series models". No. Civ. A. 99-CV-214, 1999 WL 415390, at *1 (E.D. Pa. June 21, 1999). In that case, plaintiff alleged only one misrepresentation, that "BMW has marketed the GM five-speed automatic transmissions in these models as a BMW product". Id. Nevertheless, the case was complicated by, among other things, variations in state law and individual questions of reliance. See id. at *2-*3. Accordingly, the court held that a class action was not superior to individual actions because "Plaintiff cannot overcome numerous factual and legal issues and offer a workable plan to take advantage of the economies of class treatment." Id. at *5; see also Castano, 84 F.3d at 747 ("extensive manageability problems" precluded certification). Here, too, there are countless

[10] Curative jury instructions and special verdict forms cannot remedy this problem. In light of the large number of statements and transactions at issue and defendants to be tried, countless permutations of curative jury instructions would be required. Under these circumstances, the instructions themselves would hopelessly confuse a jury.

[11] The differences that stratify the putative class, and require separate proof depending on when particular class members purchased and on what they relied, also show that common questions do not predominate over individual issues. This is an additional reason why Rule 23(b)(3) has not been satisfied. (See supra Part II.)

factual and legal issues that render class treatment using Lead Plaintiff's overbroad class definition difficult to manage and inferior to smaller actions. At a minimum, Lead Plaintiff must propose a plan that addresses the significant manageability concerns raised by the class action defined by Lead Plaintiff. It has not satisfied its burden of doing so, and, accordingly the class defined by Lead Plaintiff cannot be certified.[12]

IV. IF A CLASS IS CERTIFIED, THE CLASS PERIOD SHOULD BEGIN NO EARLIER THAN APRIL 8, 1999, AND END NO LATER THAN OCTOBER 16, 2001.

Lead Plaintiff proposes that the Court certify a class of all purchasers who bought Enron or Enron-related securities between October 19, 1998, and November 27, 2001. (Lead Pl.'s Am. Mot. for Class Cert. at 1; Am. Compl. ¶ 1.) This class period, however, includes purchasers whose claims against the Financial Institution Defendants are time-barred (because they bought too long ago) or precluded as a matter of law (because they bought too recently). As demonstrated below, the class period against the Financial Institution Defendants can begin no earlier than April 8, 1999, and end no later than October 16, 2001.[13]

A. The Proposed Class Period Can Begin No Earlier Than April 8, 1999.

Claims brought under Section 10(b) of the 1934 Act and Sections 11 and 12(a)(2) of the 1933 Act must be commenced within one year after investors are on notice of the general facts constituting the violation, and in no event later than three years from the date of alleged

[12] In re American Contintental Corp./Lincoln Savings & Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992), on which Lead Plaintiff relies (at 2, 29), is not to the contrary. That case involved only nine defendants and two securities. Here, by contrast, there are 7 times as many defendants and 8 times as many securities (if we count only Enron's common stock, the four securities that are the subject of the Section 11 claims and the eleven securities offered in the nine offerings that are the subject of the Section 12(a)(2) claims).

[13] In addition, as demonstrated below, the proposed class period for certain putative class members' Section 11 claims must end on March 30, 2000, and for others it must end on April 2, 2001. (See infra Part VI.A.)

violation. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991) (Section 10(b) claims); 15 U.S.C. § 77m (Section 11 and 12(a)(2) claims). Claims for control person liability under Section 20(a) of the 1934 Act and Section 15 of the 1933 Act are governed by the same statute of limitations as the predicate claims. See, e.g., Eureka Homestead Soc'y v. Zirinsky, Civ. A. No. 94-2265, 1995 WL 542482, at *2 n.2 (E.D. La. Sept. 12, 1995).[14] Here, plaintiffs did not assert any claims against any of the Financial Institution Defendants until April 8, 2002, when they filed the Consolidated Complaint.[15] All federal claims brought against the Financial Institution Defendants to recover for purchases made prior to April 8, 1999—more than three years before any claims were filed against the Financial Institution Defendants—are therefore barred by the applicable three-year statute of limitations. See In re Enron, 235 F. Supp. 2d at 689 ("Lead Plaintiff has responded that it is not seeking to recover damages for alleged misconduct that occurred more than three years before suit was filed, but is pleading such purported violations solely to establish evidence of a scheme and of scienter. Such evidence is admissible for this purpose.") (citations omitted). Accordingly, the class period alleged against the Financial Institution Defendants may start, at the earliest, on April 8, 1999.[16]

[14] As we demonstrated in our motions to dismiss the Amended Complaint, the longer limitations period established by the Public Company and Accounting Reform and Investor Protection Act of 2002 (the "Sarbanes-Oxley Act"), Pub. L. No. 107-204 § 804, 116 Stat. 745, 801 (2002) (codified at 28 U.S.C. § 1658) ("Sec. 804"), does not apply to this action. The Sarbanes-Oxley Act extends the statute of limitations only for proceedings that began after July 30, 2002 (Sec. 804(b)), and this litigation began on October 22, 2001. See In re Enron Corp. Sec., Derivative & ERISA Litig., 258 F. Supp. 2d 576, 601 n.20 (S.D. Tex. 2003) ("This amended limitations period does not apply to Newby.").

[15] Moreover, as the Financial Institution Defendants previously demonstrated in their motions to dismiss the Amended Complaint, certain of their corporate affiliates were named for the first time in the Amended Complaint and Lead Plaintiff's claims against them are time-barred in their entirety as a matter of law.

[16] Notably, in opposing the Financial Institution Defendants' motions to dismiss the Consolidated Complaint, Lead Plaintiff conceded that "the three-year statute of repose bars damages recovery from [the Financial Institution Defendants] on behalf of purchasers who

B. The Proposed Class Period Should End No Later Than October 16, 2001.

On October 16, 2001, as Lead Plaintiff put it, Enron "shocked the markets" by announcing that it had overstated its financial condition by over $1 billion. (Am. Compl. ¶ 61; see also Enron News Release, dated Oct. 16, 2001 (Baily Decl. Ex. 18).) This disclosure operated as a "correction" of the earlier financial statements and other statements about Enron's financial condition that form the basis for the claims in this case—as the Court previously recognized when it found that plaintiffs who purchased after Enron's initial corrective disclosures were not typical plaintiffs. In re Enron Corp. Sec. Litig., 206 F.R.D. 427, 455 (S.D. Tex. 2002). This information was "transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance" Enron's earlier financial reports. Provenz v. Miller, 102 F.3d 1478, 1493 (9th Cir. 1996) (citation omitted). Indeed, immediately after that announcement, Enron's stock price crumbled as many investors sold their Enron securities. In light of Enron's corrective disclosures, the alleged class period should end on October 16, 2001. See In re Ribozyme Pharm., Inc. Sec. Litig., 205 F.R.D. 572, 581 (D. Colo. 2001) (concluding that the class period should end with the disclosure of curative information); In re LTV Sec. Litig., 88 F.R.D. 134, 147-48 (N.D. Tex. 1980) (same).

1. Claims Under Section 10(b) Based on Purchases Made After October 16, 2001, Fail as a Matter of Law.

As noted above, Lead Plaintiff alleges the Section 10(b) element of reliance based on the "fraud-on-the-market" presumption.[17] Under the "fraud-on-the-market" theory, "[a]ny

---

purchased before 4/8/99." (See, e.g., Lead Pl.'s Mem. of Points and Authorities in Opp. to Mot. to Dismiss by Citigroup, dated June 10, 2002, at 42.) Thus, the class period alleged against the Financial Institution Defendants can begin no earlier than that date.

[17] As we demonstrate above in Part II, the "fraud-on-the-market" presumption of reliance is not applicable to Lead Plaintiff's novel theory of liability against the Financial Institution Defendants.

showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance". Basic, 485 U.S. at 248. Thus, to the extent the "fraud-on-the-market" presumption applies (and it does not), if the information that the plaintiff claims was concealed or misrepresented "credibly entered the market and dissipated the effects of the misstatements", a plaintiff who "traded . . . after the corrective statements would have no direct or indirect connection with the fraud". Id. at 248-49; see also In re Enron, 235 F. Supp. 2d at 574 (explaining that a misrepresentation is "immaterial if the information is already known to the market because that misrepresentation therefore cannot defraud the market").

Here, Enron "shocked the markets" when it publicly announced that it had overstated its financial condition by over $1 billion on October 16, 2001. (Am. Compl. ¶ 61.) After October 16, 2001, putative class members who purchased Enron securities could not have relied on the alleged fraud. See Basic, 485 U.S. at 248-49. Lead Plaintiff cannot save these claims by certifying them together with purchases made before October 16. See Semerenko v. Cendant Corp., 223 F.3d 165, 181 (3d Cir. 2000) (concluding that, after a company's disclosure of accounting irregularities and warning to "investors not to rely on its prior financial statements and auditor's reports", which were followed by an "instantaneous" decline in the company's stock price, "neither the market nor the Class members could have reasonably relied upon [the] prior financial statements or [the] audit reports"); In re Safeguard Scientifics, 216 F.R.D. at 582 (observing that a plaintiff's security purchases after the disclosure of the alleged fraud are "a compelling reason to rebut the reliance presumption"). Indeed, this Court previously concluded that the Florida State Board of Administration, which purchased Enron stock between October 19 and November 16, 2001, "did not buy this stock based in reliance either on the market or on statements by Enron or its agents, or on Registration Statements and Prospectuses". In re Enron, 206 F.R.D. at 455. That reasoning is equally applicable here, and the class period should end on October 16, 2001.[18]

2. Claims Under Sections 11 and 12(a)(2) Based on Purchases Made After October 16, 2001, Fail as a Matter of Law.

Under Sections 11 and 12(a)(2), the defense of loss causation, if proven, may preclude all liability. See 15 U.S.C. §§ 77k(b), 77l(b). In addition, under Section 11, plaintiffs must prove reliance if, before they bought the security, "the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement". 15 U.S.C. § 77k(a); see also In re Enron, 258 F. Supp. 2d at 595 (discussing the "statutory exception to the no-reliance-requirement rule"). As explained below, putative class members whose Section 11 and 12(a)(2) claims are based on purchases made after October 16 cannot prevail as a matter of law.

First, for Section 11 and 12(a)(2) claims relating to securities acquired after October 16, 2001, putative class members are subject to an absolute loss causation defense. By October 16, Enron had "shocked the markets" by announcing that it had overstated its financial condition by more than $1 billion. (See supra Part IV.B.1.) Accordingly, plaintiffs' losses from purchases after that date could not have been caused by the alleged fraud. See Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 651 F.2d 615, 620 (9th Cir. 1981) (plaintiffs

[18] Lead Plaintiff appears to recognize that persons who purchased after October 16, 2001, are in a different position from those who purchased before October 16. Although Lead Plaintiff lists the proposed class representatives' purchases made before October 16, 2001, in its amended motion to certify the class, it conspicuously omits any mention of purchases a number of them made after October 16. (Compare Jaconette Decl. Exs. 6, 15 (listing all purchases made by Amalgamated Bank and San Francisco, respectively, including purchases made after October 16) with Lead Pl.'s Am. Mot. for Class Cert. at 20-22 (listing only purchases made by Amalgamated Bank and San Francisco before October 16).)

"cannot recover that part of their loss caused by their own failure, once they had reason to know of the wrongdoing, to take reasonable steps to avoid further harm"); Goldkrantz v. Griffin, No. 97 CIV. 9075 (DLC), 1999 WL 191540, at *3-*7 (S.D.N.Y. Apr. 6, 1999), aff'd, 201 F.3d 431 (2d Cir. 1999).

Second, Lead Plaintiff's Section 11 claims against certain Financial Institution Defendants based on three securities offerings require proof of reliance. They are: (1) a May 19, 1999 offering of Enron Corp. 7.375% Notes due 5/15/2019, where the registration statement became effective on February 5, 1999 (Am. Compl. ¶ 1006); (2) an August 10, 1999 offering of Enron Corp. 7% Exchangeable Notes due 7/31/2002, where the registration statement became effective on August 10, 1999 (id.); and (3) a June 1, 2000 offering of Enron Corp. 7.875% Notes due 6/15/2003, where the registration statement became effective on May 15, 2000 (id.). On March 30, 2000, Enron filed its Form 10-K for 1999, containing financial statements for the twelve month period between January 1, 1999, and December 31, 1999. (See Enron 1999 Form 10-K, filed March 30, 2000 (Baily Decl. Ex. 21).) Similarly, on April 2, 2001, Enron filed its Form 10-K for 2000, containing financial statements for the twelve month period between January 1, 2000, and December 31, 2000. (See Enron 2000 Form 10-K, filed April 2, 2001 (Baily Decl. Ex. 20).) As a result, as the Court previously held, Section 11 plaintiffs who purchased the 7.375% and 7% Notes after March 30, 2000, and the 7.875% Notes after April 2, 2001, must establish reliance. See 15 U.S.C. § 77k(a); In re Enron, 258 F. Supp. 2d at 640-41, 649 (dismissing Amalgamated Bank's Section 11 claim based on a June 2001 purchase of 7.375% Notes, "after Enron filed its Form 10-K for 2000", because Amalgamated Bank did not plead reliance). As demonstrated above, putative class members who purchased those Notes after October 16, 2001, could not have relied upon the alleged fraud. (See supra Part IV.B.1.)

3. At a Minimum, the Proposed Class Period Must End No Later Than November 8, 2001.

To the extent that the class period does not end on October 16, 2001, it must end no later than November 8, 2001. On that day, Enron publicly announced that it was restating its financial statements for 1997 through 2000 to eliminate approximately $600 million in profits and approximately $1.2 billion in shareholders' equity. (Am. Compl. ¶ 61; Enron News Release, dated Nov. 8, 2001 (Baily Decl. Ex. 19).) In that same public announcement, Enron expressly warned investors that the company's "financial statements . . . and the audit reports relating to the year-end financial statements for 1997 through 2000 should not be relied upon". (Am. Compl. ¶ 61; Enron News Release, dated Nov. 8, 2001 (Baily Decl. Ex. 19) (emphasis added).) After that announcement, no plaintiff who purchased Enron securities could reasonably have relied on Enron's financial statements. (See supra Part IV.B.1.)[19] Thus, at a minimum, the class period must end no later than November 8, 2001.

V. THE PROPOSED CLASS REPRESENTATIVES LACK STANDING TO REPRESENT THE PUTATIVE CLASS IN ITS CLAIMS UNDER SECTION 12(a)(2).

Plaintiffs have alleged Section 12(a)(2) claims against certain Financial Institution Defendants based on nine offerings of debt securities.[20] None of the proposed class representatives purchased in any of those offerings. Accordingly, there is no proposed class

[19] The proposed class representatives—including the Regents—confirmed this fact. For example, they testified that it was not reasonable to hold Enron stock after the SEC's investigation was announced on October 22, 2001 (Heil Dep. at 293-94 (Regents) (Baily Decl. Ex. 5)), and they did not rely upon Enron's financial statements after November 8 (Bobbs Dep. at 102-03 (Staro) (Baily Decl. Ex. 2)).

[20] Specifically, Lead Plaintiff alleges that CIBC World Markets Corp., CIBC World Markets plc, Pershing LLC, Salomon, Salomon International, Barclays Capital Inc., Lehman Brothers Inc., Credit Suisse First Boston LLC, Banc of America Securities LLC, and J.P. Morgan Chase Securities Inc. violated Section 12(a)(2) of the Securities Act of 1933.

representative with standing to assert the Section 12(a)(2) claims, and no class can be certified to pursue those claims.[21]

A. The Proposed Class Representatives Lack Standing to Assert Section 12(a)(2) Claims Because They Did Not Purchase Any of the Securities at Issue.

To maintain a class action under Section 12(a)(2), the proposed class representatives must first demonstrate that they have individual standing to pursue such claims. See In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995) ("[I]t is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be a part of that class . . . .") (citation omitted); see also Lewis v. Casey, 518 U.S. 343, 357 (1996) (stating that "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (citation omitted).

Section 12(a)(2) provides that a person who "offers or sells a security" pursuant to a materially misleading prospectus or oral communication "shall be liable . . . to the person purchasing such security from him". 15 U.S.C. § 77l(a) (emphasis added). Thus, as a threshold standing requirement, a Section 12(a)(2) plaintiff must have purchased the securities issued and sold pursuant to the challenged communication. See id.; In re Azurix Corp. Sec. Litig., 198 F. Supp. 2d 862, 892 (S.D. Tex. 2002), aff'd sub nom. Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003). Moreover, the plaintiff must have purchased the securities in the course of a public offering and from the defendant. See Rosenzweig, 332 F.3d at 871-72; see also Gustafson v. Alloyd Co., 513 U.S. 561, 584 (1995) (holding that Section 12 does not apply to secondary,

[21] Lead Plaintiff also purports to assert Section 10(b) claims based on the Enron-related securities that are the subject of its Section 12(a)(2) claims. Since there is no proposed class representative who purchased these securities, there is also no proposed class representative with standing to bring a Section 10(b) claim.

aftermarket purchases). The latter requirement is satisfied if the defendant either transferred title to the securities to the plaintiff or successfully solicited the plaintiff's purchase. See Pinter v. Dahl, 486 U.S. 622, 642-47 (1988); Cyrak v. Lemon, 919 F.2d 320, 324-25 (5th Cir. 1990). "To count as 'solicitation,' the seller must, at a minimum, directly communicate with the buyer." Rosenzweig, 332 F.3d at 871.

Plaintiffs' purported Section 12(a)(2) claims are based on nine different securities offerings:

(1) September 23, 1999 offering of 8.31% Senior Secured Notes due 2003 of Osprey Trust, Osprey I, Inc.;

(2) November 15, 1999 offering of 8.25% Series 1999-A Linked Enron Obligations due 2004 of Yosemite Securities Trust I;

(3) February 15, 2000 offering of 8.75% Series 2000-A Linked Enron Obligations due 2007 of Yosemite Securities Co. Ltd;

(4) August 17, 2000 offering of 8% Enron Credit Linked Notes due 2005 of Enron Credit Linked Notes Trust;

(5) September 28, 2000 offering of 7.797% Senior Secured Notes due 2003 and 6.375% Senior Secured Notes due 2003 of Osprey Trust, Osprey I, Inc.;

(6) May 17, 2001 offering of 6.5% Enron Euro Credit Linked Notes due 2006 of Enron Euro Credit Linked Notes Trust;

(7) May 17, 2001 offering of 7.375% Enron Credit Linked Notes due 2006 of Enron Credit Linked Notes Trust II;

(8) May 17, 2001 offering of 7.25% Enron Sterling Credit Linked Notes due 2006 of Enron Sterling Credit Linked Notes Trust; and

(9) July 12, 2001 offering of 6.31% Senior Secured Notes due 2003 and 6.19% Senior Secured Notes due 2003 of Marlin Water Trust II, Marlin Water Capital Corp. II. (See Am. Compl. ¶ 1016.4.)

Not one of the proposed class representatives purchased any of these securities. (Am. Compl. ¶¶ 79-81; Jaconette Decl. Exs. 4-25.) Accordingly, none of the proposed class representatives has standing to assert a Section 12(a)(2) claim, and no class may be certified to pursue these claims. See 15 U.S.C. § 77l(a); Franze v. Equitable Assurance, 296 F.3d 1250, 1254 (11th Cir. 2002) (holding that a plaintiff lacking standing cannot satisfy the prerequisites for class representation under Rule 23); In re Paracelsus Corp., Sec. Litig., 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (holding that plaintiffs who did not purchase the notes at issue could not sue under Section 12(a)(2) on behalf of a class of persons who did purchase those notes).

B. The Proposed Intervenor Cannot Cure The Proposed Class Representatives' Standing Defects.

In an attempt to cure the obvious Section 12(a)(2) standing defect, the Imperial County Employees Retirement System ("ICERS") has filed a motion to intervene. According to ICERS, it purchased 6.31% Notes of Marlin Water Trust II, which is only one out of the nine securities offerings that are the subject of Lead Plaintiff's Section 12(a)(2) claims. (See Imperial County Employees Retirement System's and IHC Health Plans, Inc.'s Mot. to Intervene Under Fed. R. Civ. P. 24(b)(2) ("Mot. to Intervene"), Ex. A.)[22]

As an initial matter, ICERS does not claim that it purchased any of the securities issued in the first eight offerings listed above. (Id.) Like the existing proposed class representatives, ICERS lacks standing to sue under Section 12(a)(2) based on those offerings. Thus, even if ICERS is permitted to intervene, there still remains no proposed class representative with standing to pursue Lead Plaintiff's Section 12(a)(2) claims based on offerings (1)-(8) listed above. See 15 U.S.C. § 77l(a); James v. City of Dallas, Texas, 254 F.3d 551, 563 (5th Cir. 2001) ("Both standing and class certification must be addressed on a claim-by-claim basis."), cert. denied, 534 U.S. 1113 (2002); In re Paracelsus Corp., 6 F. Supp. 2d at 631.

[22] The Financial Institutions have opposed this motion on the grounds that ICERS's claims are time-barred and that plaintiffs are improperly using the motion to cure defective standing allegations in the Amended Complaint. Two other non-parties, IHC Health Plans, Inc. and Deseret Mutual Benefit Administrators, withdrew their Motions to Intervene on October 2, 2003.

Moreover, ICERS has not established that it has standing to pursue a Section 12(a)(2) claim based on the 6.31% Notes of Marlin Water Trust II offering against the Financial Institution Defendants. While ICERS apparently has satisfied the threshold requirement of a purchase, it has not demonstrated that it bought the Marlin Water Trust II Notes from any of the Financial Institution Defendants and, accordingly, does not have standing to sue them. See Pinter, 486 U.S. at 642-47; Cyrak, 919 F.2d at 324-25; In re AMF Bowling Sec. Litig., No. 99 CIV.3023(DC), 2002 WL 461513, at *6 (S.D.N.Y. Mar. 26, 2002) (refusing to certify a Section 12(a)(2) class where the proposed class representative bought the stock but not from the defendants, without any solicitation, and not in the IPO).

Nor has ICERS established that it can satisfy Rule 23(a)'s typicality and adequacy requirements. First, ICERS does not make its own investment decisions. Instead, it hires investment managers, who have broad discretion and whose judgment ICERS admittedly does not "question" or "second guess". (McFetridge Dep. at 21, 73, 111, 119, 133 (Baily Decl. Ex. 11).) Accordingly, ICERS does not satisfy the typicality requirement. See In re Caremark Int'l, Inc. Sec. Litig., No. 94 C 4751, 1996 WL 351182, at *6 (N.D. Ill. June 24, 1996). Second, ICERS is not an adequate representative because it has not demonstrated either willingness or ability to manage and control this litigation. Barbara Ann McFetridge, on behalf of ICERS, testified that she considers it to be Lead Plaintiff's and Lead Counsel's responsibility to manage the litigation. She testified:

"Q: Do you also believe that it's one of ICERS' duties as a class representative [to] take an active role in this litigation?

"A: No. I think that's the lead plaintiff and the lead counsel's job. We need to stay informed and provide whatever needs to be done.

"Q: Do you believe that it's ICERS' job or lead plaintiff's job to direct or control the litigation?

"A: I believe that would be lead plaintiff and the lead counsel's job of keeping us informed." (McFetridge Dep. at 183 (Baily Decl. Ex. 11).)

Thus, ICERS fails the adequacy test. See Berger v. Compaq Computer Corp., 257 F.3d 475, 479-84 (5th Cir. 2001) ("class representatives, and not lawyers, must direct and control the litigation."); Umsted v. Intelect Comms., Inc., No. Civ. A. 3:99-CV-2604, 2003 WL 79750, at *3 (N.D. Tex. Jan. 7, 2003) ("[C]lass representatives must be willing to be more than spectators; they must work at and participate actively in the litigation.").

C. If Plaintiffs' Section 12(a)(2) Claims Are Certified, A Separate Subclass Should Be Defined With Respect to Each of the Nine Offerings.

As noted above, Lead Plaintiff's Section 12(a)(2) claims arise out of nine different securities offerings by different entities, at different times, pursuant to different offering documents that incorporate different Enron financial statements, and were underwritten by different Financial Institution Defendants. If these claims somehow survive the pending motions to dismiss and a class is certified, that class should be separated into distinct subclasses for each of the nine offerings, each of which would need a representative with standing.

Under Rule 23(c)(4), district courts have discretion to divide a class into subclasses "[w]hen appropriate". Fed. R. Civ. P. 23(c)(4); Marisol A. v. Giuliani, 126 F.3d 372, 378-79 (2d Cir. 1997); Chisholm v. Jindal, No. CIV. A. 97-3274, 1998 WL 92272, at *6 (E.D. La. Mar. 2, 1998). Courts should create subclasses where different groups of putative class members assert different or conflicting claims, or if their claims arise from different factual circumstances. See Marisol, 126 F.3d at 378-79; see also In re Enron, 206 F.R.D. at 444 (observing that "the Court is required to insure that independent classes with conflicts are protected by subdivision and separate representation"); Levine v. Am. Exp. Indus., Inc., No. 71 Civ. 5128, 1976 WL 753, at *3 (S.D.N.Y. Jan. 8, 1976) (certifying subclass "in light of the varied and diverse transactions sued upon herein").

Lead Plaintiff's alleged Section 12(a)(2) claims raise different issues and require different proof for each of the nine offerings identified in the Amended Complaint. The offerings occurred at different times and involved different issuers and underwriters. (Am. Compl. ¶ 1016.4.) Moreover, Lead Plaintiff alleges that different misrepresentations were made in connection with the different offerings. (Am. Compl. ¶¶ 641.5, 641.6, 641.9, 641.11, 641.14, 641.16, 641.19, 641.20, 641.23, 641.24, 641.27, 641.28, 641.31, 641.32, 641.35, 641.36, 641.39, 641.40.) If all Section 12(a)(2) claims are litigated together, nine separate and distinct determinations must be made concerning, among other things, the materiality of the alleged misrepresentation and the reasonableness of the underwriters' conduct. See 15 U.S.C. §§ 77l(a)(2), 77l(b). Thus, a proceeding with one undifferentiated plaintiff class, without subclasses, will not promote either judicial economy or expediency, the primary purposes of the class action device. See Allison, 151 F.3d at 410 (5th Cir. 1998) ("[T]he class action device exists primarily, if not solely, to achieve a measure of judicial economy [because it] permit[s] issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion."); Klein v. A.G. Becker Paribas Inc., 109 F.R.D. 646, 653 (S.D.N.Y. 1986) (certifying one class for claims under Section 10(b) and a subclass for claims under Sections 11 and 12(2)). If the Section 12(a)(2) claims are somehow permitted to proceed, subclasses should be created for each of the nine offerings that are the subject of those claims, and each would need a class representative with standing.

VI. THE SECTION 11 CLAIMS SHOULD NOT BE CERTIFIED.

In addition to the 225 separate and distinct alleged material misstatements Lead Plaintiff identifies as a predicate for its Section 10(b) claims, plus the alleged course of conduct by the Financial Institution Defendants that allegedly also violated Section 10(b), Lead Plaintiff alleges claims against certain Financial Institution Defendants under Section 11 of the Securities Act of 1933 based on four public securities offerings. (See Am. Compl. ¶ 1006.)[23] Three of those securities offerings were underwritten by three different subsets of the Financial Institution Defendants:

(1) a May 19, 1999 offering of Enron Corp. 7.375% Notes due 5/15/2019, underwritten by Lehman Brothers Inc., Banc of America Securities LLC and CIBC World Markets Corp.;

(2) an August 10, 1999 offering of Enron Corp. 7% Exchangeable Notes due 7/31/2002, underwritten by Banc of America Securities LLC and Salomon Smith Barney, Inc.; and

(3) a June 1, 2000 offering of Enron Corp. 7.875% Notes due 6/15/2003, underwritten by Lehman Brothers Inc. (Am. Compl. ¶ 1006.)[24]

These offerings were conducted at different times, incorporated different Enron financial statements allegedly affected by different transactions, and were underwritten by different combinations of certain Financial Institution Defendants. Thus, Lead Plaintiff's Section 11 claims add yet another layer of complexity to this lawsuit. As explained in Part III, these issues raise severe manageability problems that counsel against the maintenance of this lawsuit as a single class action. In any event, the Section 11 claims of certain putative class members cannot be certified because they must prove reliance, and, at a minimum, Section 11 subclasses should be created.

---

[23] Lead Plaintiff alleges that Lehman Brothers Inc., Banc of America Securities LLC, CIBC World Markets Corp. and Salomon Smith Barney, Inc. violated Section 11 of the Securities Act of 1933. (See Am. Compl. ¶¶ 1006, 1013.)

[24] The fourth securities offering that is the subject of Lead Plaintiff's Section 11 claim is a July 18, 2001 offering of Enron Corp. Zero Coupon Convertible Senior Notes due 2021. (See Am. Compl. ¶ 1006.) None of the Financial Institution Defendants is alleged to have underwritten this offering, and none of them is named a defendant with respect to this offering. (Id.)

A. The Proposed Class Period for Section 11 Claims Based on Purchases of Enron 7.375% and 7% Notes Must End on March 30, 2000, and the Proposed Class Period for Section 11 Claims Based on Purchases of Enron 7.875% Notes Must End on April 2, 2001.

On March 30, 2000, Enron filed its Form 10-K for 1999, containing financial statements for the twelve month period between January 1, 1999, and December 31, 1999. (See Enron 1999 Form 10-K, filed March 30, 2000 (Baily Decl. Ex. 21).) On April 2, 2001, Enron filed its Form 10-K for 2000, containing financial statements for the twelve month period between January 1, 2000, and December 31, 2000. (See Enron 2000 Form 10-K, filed April 2, 2001 (Baily Decl. Ex. 20).) Accordingly, as explained above in Part IV.B.2 and as the Court previously held, putative class members who bought 7.375% and 7% Notes after March 30, 2000, will be required to prove that they relied on the allegedly false or misleading registration statements issued in those offerings because the registration statement for 7.375% Notes became effective on February 5, 1999, and the registration statement for 7% Notes became effective on August 10, 1999. See 15 U.S.C. § 77k(a); In re Enron, 258 F. Supp. 2d at 640-41, 649 (dismissing Section 11 claim based on a purchase of the 7.375% Notes in June 2001 because reliance was not pled). Likewise, putative class members who bought 7.875% Notes after April 2, 2001, must demonstrate that they relied on the allegedly false or misleading registration statement issued in that offering because the registration statement for 7.875% Notes became effective on May 15, 2000.

Lead Plaintiff has not alleged, however, and has not offered any evidence to show, that these specific securities were traded in an efficient market. Absent that showing, the Court cannot presume that purchasers of those securities relied on the registration statements issued in these offerings. See Basic, 485 U.S. at 247. Moreover, even if such a showing were made, the "fraud-on-the-market" presumption of reliance does not apply to Lead Plaintiff's claims against the Financial Institution Defendants. (See supra Part II.) Thus, with respect to Section 11 claims brought by purchasers of 7.375% and 7% Notes after March 30, 2000, and by purchasers of 7.875% Notes after April 2, 2001, individual issues of reliance predominate and no class for the purchasers of those securities after those dates can be certified.

B. If Certified, the Putative Class Should Be Divided Into Separate Subclasses To Prosecute Plaintiffs' Section 11 Claims.

"[T]he class action device exists primarily, if not solely, to achieve a measure of judicial economy . . . ." Allison, 151 F.3d at 410. Treating a group of plaintiffs as one class is appropriate when the class treatment "permit[s] issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion". Id. By contrast, "sub-classes are appropriate where, such as here, unmanageability at trial would otherwise result." Levine, 1976 WL 753, at *3. "When one lawsuit presents . . . different acts committed during different time periods, sub-class treatment has been considered appropriate." Id.; see also Klein, 109 F.R.D. at 653. Litigating all Section 11 claims together will not promote efficiency. To the contrary, it will further complicate and delay the litigation, especially if those claims are litigated alongside Lead Plaintiff's Section 10(b) claims.

1. Purchasers of Enron 7.375%, 7%, and 7.875% Notes Constitute Three Distinct Subclasses.

As noted above, the three offerings that are the subject of Lead Plaintiff's Section 11 claims against certain Financial Institution Defendants were conducted at different times, incorporated different Enron financial statements allegedly affected by different transactions, and were underwritten by different combinations of Financial Institution Defendants. As a result, there will be different sets of facts relevant to each offering, requiring separate and distinct determinations regarding, among other things, materiality, due diligence and loss causation.

First, for each offering, plaintiffs must independently prove that the respective registration statement "contained an untrue statement of a material fact or omitted to state a material fact . . . necessary to make the statements therein not misleading". 15 U.S.C. § 77k(a); see also Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir. 1993) (discussing materiality). A misstated or omitted fact is material if "a reasonable investor would consider [it] significant in the decision whether to invest, such that it alters the 'total mix' of information available about the proposed investment". Id.; see also Halperin v. eBanker USA.COM, Inc., 295 F.3d 352, 356-57 (2d Cir. 2002) (discussing materiality standard for federal securities actions). Thus, "[m]ateriality is not judged in the abstract, but in light of the surrounding circumstances". Krim, 989 F.2d at 1448.

Here, the relevant facts, and the alleged false statements, vary from offering to offering. Indeed, Lead Plaintiff alleges that the registration statements in each of the three offerings were false and misleading for different reasons: Lead Plaintiff alleges the 7.375% Notes offering documents contained false statements from Enron's Forms 10-K for 1997 and 1998; the 7% Notes offering documents contained allegedly false statements from Enron's Form 10-K for 1998 only; and the 7.875% Notes offering documents contained allegedly false statements from Enron's Forms 10-K for 1997, 1998 and 1999. (Am. Compl. ¶ 612.) The challenged statements in these three sets of documents cover different subject matters and different time periods. For example, Lead Plaintiff's allegations that Enron had issued false statements concerning its broadband operations refer only to Enron's Forms 10-K for 1999 and 2000, and can only be relevant to the Section 11 claim based on the 7.875% Notes offering. (Am. Compl. ¶¶ 631-39.) Thus, the alleged misrepresentations in the offering materials for each of the three offerings differ both in content and in context, and the determination whether the registration statement was materially misleading will be different for each offering. See Krim, 989 F.2d at 1448; Simon, 482 F.2d at 882 ("a fraud case may be unsuited for treatment as a class action" if "there is any material variation in the representations made", or if "the [challenged] writings contain material variations, emanate from several sources, or do not actually reach the subject investors").

Second, the Financial Institution Defendants that are sued in connection with each offering will have due diligence defenses that raise different factual issues for each offering. Under Section 11, underwriters are not liable if they prove that "after reasonable investigation" they had "reasonable ground to believe and did believe" that the registration statement was not materially misleading—or, with respect to the "expertised" portions of the registration statement, that they "had no reasonable ground to believe and did not believe" that those portions were misleading. 15 U.S.C. § 77k(b)(3); see also In re Enron, 258 F. Supp. 2d at 595-96. The standard for assessing the reasonableness of a defendant's investigation or belief under this provision is "that required of a prudent man in the management of his own property". 15 U.S.C. § 77k(c). The application of this test therefore requires a careful review of the specific circumstances of each securities offering. See In re Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 621-22 (9th Cir. 1994); In re Enron, 258 F. Supp. 2d at 639 (the due diligence determination is "fact-specific").

Third, the three different securities offerings give rise to distinct issues of loss causation. Under Section 11, a plaintiff cannot recover any portion of its alleged damages that the defendant proves "represents other than the depreciation in value" caused by the allegedly false and misleading statements in the offering documents. 15 U.S.C. § 77k(e). As noted above, Lead Plaintiff has alleged that the offering documents for the three offerings contain different alleged misrepresentations made at different times. Accordingly, the facts underlying the loss causation inquiry will be different for each of the three offerings, and subclasses should be created. See Klein, 109 F.R.D. at 653; Levine, 1976 WL 753, at *3-*4.

2. If a Class is Certified for Putative Class Members Who Bought Enron 7.375% and 7% Notes After March 30, 2000, and for Putative Class Members Who Bought 7.875% Notes After April 2, 2001, Distinct Subclasses Should Be Created.

Lead Plaintiff's Section 11 claims based on the 7.375%, 7% and 7.875% Notes, if they can be certified at all, require yet another subclassification for each security—subclasses for purchasers of 7.375% and 7% Notes before March 30, 2000, and for purchasers of 7.875% Notes before April 2, 2001 (none of whom need to prove the element of reliance), and subclasses for purchasers after those dates (who do need to prove reliance[25])—for a total of six separate subclasses. As demonstrated above, putative class members who bought 7.375% and 7% Notes after March 30, 2000, and putative class members who bought 7.875% Notes after April 2, 2001, will be required to demonstrate that they relied on the allegedly false or misleading registration statements issued in those offerings. See 15 U.S.C. § 77k(a); In re Enron, 258 F. Supp. 2d at 640-41, 649. By contrast, putative class members who purchased those securities before those dates do not need to prove reliance. Because of this difference between the two groups' burdens of proof, they should be treated as distinct subclasses. See Simon, 482 F.2d at 882 ("If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action."); accord Klein, 109 F.R.D. at 653; Levine, 1976 WL 753, at *3-*4.

[25] For the reasons set forth in Part VI.A supra, individual issues of reliance make class certification of these subclasses inappropriate.

Conclusion

For the reasons stated above, we respectfully submit that the requirements of Rule 23 have not been satisfied, and that the class defined by Lead Plaintiff cannot be certified. To the extent any class is certified, (1) the class period should be limited to April 8, 1999 through October 16, 2001 (or November 8, 2001, at the very latest) to reflect (a) the statute of limitations applicable to the claims against the Financial Institution Defendants and (b) the corrective disclosures that vitiate any claims with respect to later purchases, and (2) appropriate subclasses should be created for each of Lead Plaintiff's separate and distinct claims under the Securities Act of 1933.

October 23, 2003

Respectfully submitted,

Lawrence D Finder /by permission

Lawrence D. Finder
Southern Dist. Id. No. 602
Texas Bar No. 07007200
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

George W. Bramblett, Jr.
Southern Dist. Id No. 10132
Texas Bar No. 02867000
Noel M.B. Hensley
Southern Dist. Id. No. 10125
Texas Bar No. 09491400
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, TX 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

Odean L. Volker
Southern Dist. Id. No. 12685
Texas Bar No. 20607715
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEYS FOR CREDIT SUISSE FIRST BOSTON LLC (f/k/a/ CREDIT SUISSE FIRST BOSTON CORPORATION), CREDIT SUISSE FIRST BOSTON (USA) INC., AND PERSHING LLC

Hugh R. Whiting/by permission

Hugh R. Whiting
Texas Bar No. 21373500
Southern Dist. Id. No. 30188
JONES DAY
600 Travis Street, Suite 6500
Houston, Texas 77002-3008
Telephone: (832) 239-3939
Telecopier: (832) 239-3600

OF COUNSEL:

David L. Carden
Robert C. Micheletto
(not admitted in New York)
JONES DAY
222 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Telecopier: (212) 755-7306

ATTORNEYS FOR DEFENDANTS LEHMAN BROTHERS HOLDINGS INC. AND LEHMAN BROTHERS INC.

Richard Warren Mithoff /by permission

Richard Warren Mithoff
Texas Bar No. 14228500
S.D. ID. 2102
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, TX 77002
Telephone: (713) 654-1122
Telecopier: (713) 739-8085

OF COUNSEL:

Janie L. Jordan
Texas Bar No. 11012700
S.D. ID. 17407
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, TX 77002
Telephone: (713) 654-1122
Telecopier: (713) 739-8085

Charles A. Gall
Texas Bar No. 07281500
S.D. ID. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. ID. 16337
JENKENS & GILCHRIST, A PROFESSIONAL CORPORATION
1445 Ross Avenue, Suite 3200
Dallas, TX 75202
Telephone: (214) 855-4500
Telecopier: (214) 855-4300

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Jonathan K. Youngwood
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Telecopier: (212) 455-2502

ATTORNEYS FOR DEFENDANTS J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK AND JPMORGAN SECURITIES INC.

Mark D. Manela /by permission

Mark D. Manela
State Bar No. 12894500
S.D. Texas I.D. No. 1821
MAYER, BROWN ROWE & MAW LLP
700 Louisiana, Suite 3600
Houston, Texas 77002
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

OF COUNSEL:

William H. Knull, III
State Bar No. 11636900
S.D. Texas I.D. No. 7701
MAYER, BROWN ROWE & MAW LLP
700 Louisiana Street, Suite 3600
Houston, Texas 77002-3600
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

Alan N. Salpeter
Michael L. Odorizzi
T. Mark McLaughlin
MAYER, BROWN ROWE & MAW LLP
190 South LaSalle Street
Chicago, Illinois 60603
Telephone: (312) 782-0600
Telecopier: (312) 701-7711

B. J. Rothbaum
HARTZOG CONGER CASON & NEVILLE
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-7000

ATTORNEYS FOR DEFENDANTS CANADIAN IMPERIAL BANK OF COMMERCE, CIBC WORLD MARKETS CORP. (F/K/A CIBC OPPENHEIMER CORP.), CIBC WORLD MARKETS, plc

Barry Abrams/by permission

Barry Abrams
Texas Bar No. 00822700
S.D. ID. 2138
ABRAMS, SCOTT & BICKLEY, LLP
700 Louisiana, Suite 1800
Houston, Texas 77002
Telephone: (713) 228-6601
Telecopier: (713) 228-6605

OF COUNSEL:

David H. Braff
Michael T. Tomaino, Jr.
Jeffrey T. Scott
Adam R. Brebner
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Telecopier: (212) 558-3588

ATTORNEYS FOR DEFENDANTS BARCLAYS PLC, BARCLAYS BANK PLC AND BARCLAYS CAPITAL INC.

Taylor M. Hicks/by permission

Taylor M. Hicks
Texas Bar No. 09585000
Southern Dist. Id. No.. 3079
HICKS THOMAS & LILIENSTERN, LLP
700 Louisiana, Suite 1700
Houston, Texas 77002
Telephone: (713) 547-9100
Telecopier: (713) 547-9150

OF COUNSEL:

Herbert S. Washer
James D. Miller
Ignatius A. Grande
CLIFFORD CHANCE US LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 878-8000
Telecopier: (212) 878-8375

Robert F. Serio
Mitchell A. Karlan
Marshall R. King
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
Telecopier: (212) 351-4035

ATTORNEYS FOR DEFENDANT MERRILL LYNCH & CO., INC. AND MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED

Charles G. King / by permission
Charles G. King
Texas Bar No. 11470000
Southern Dist. Id. No. 1344
KING & PENNINGTON LLP
1110 Louisiana Street
Suite 5050
Houston, Texas 77002
Telephone: (713) 225-8404
Telecopier: (713) 244-8408

OF COUNSEL:

Gregory A. Markel
Ronit Setton
Nancy I. Ruskin
CADWALADER WICKERSHAM & TAFT LLP
100 Maiden Lane
New York, New York 10038
Telephone: (212) 504-6000
Telecopier: (212) 504-6666

ATTORNEYS FOR DEFENDANTS BANK OF AMERICA CORPORATION AND BANC OF AMERICA SECURITIES LLC

Jacalyn D. Scott /by permission

Jacalyn D. Scott
SBN: 17899900
WILSHIRE, SCOTT & DYER, P.C.
3000 One Houston Center
1221 McKinney
Houston, TX 77010
Telephone: (713) 651-1221
Telecopier: (713) 651-0020

OF COUNSEL:

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Telecopier: (212) 757-3990

Eugene B. Wilshire
WILSHIRE SCOTT & DYER P.C.
3000 One Houston Center
1221 McKinney
Houston, TX 77010
Telephone: (713) 651-1221
Telecopier: (713) 651-0020

ATTORNEYS FOR CITIGROUP, INC., CITIBANK, N.A., SALOMON SMITH BARNEY, INC. (now called CITIGROUP GLOBAL MARKETS INC.) AND SALOMON BROTHERS INTERNATIONAL LIMITED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on counsel electronically via the www.esl3624.com website pursuant to the Court's order in *Newby v. Enron Corp. et al.* on this 23d day of October 2003.

Odean L. Volker

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION Securities, Derivative & "ERISA" Litigation	§ § §	MDL Docket No. 1446
MARK NEWBY, et al., Plaintiffs, vs. ENRON CORPORATION, et al., Defendants.	§ § § § § § § §	Civil Action No. H-01-3624 And Consolidated Cases

DECLARATION OF MELISSA J. BAILY IN OPPOSITION TO LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION

I, Melissa J. Baily, hereby declare as follows:

1. I am associated with the law firm of Cravath, Swaine & Moore LLP. I have been admitted to appear pro hac vice in this action as an attorney for Credit Suisse First Boston LLC. I submit this declaration on personal knowledge in support of the Financial Institution Defendants' opposition to Lead Plaintiff's Amended Motion for Class Certification.

2. Attached hereto as Exhibit 1 is a true and complete copy of excerpts from the deposition of Randall Atkins, dated September 9, 2003.

3. Attached hereto as Exhibit 2 is a true and complete copy of excerpts from the deposition of Donald Trent Bobbs, dated September 10, 2003.

4. Attached hereto as Exhibit 3 is a true and complete copy of excerpts from the deposition of John J. Cassidy, dated September 4, 2003.

5. Attached hereto as Exhibit 4 is a true and complete copy of excerpts from the deposition of Wayne Chun, dated September 22, 2003.

6. Attached hereto as Exhibit 5 is a true and complete copy of excerpts from the deposition of Jeffrey Eldridge Heil, dated August 25, 2003.

7. Attached hereto as Exhibit 6 is a true and complete copy of excerpts from the deposition of Michael B. Henning, dated August 20, 2003.

8. Attached hereto as Exhibit 7 is a true and complete copy of excerpts from the deposition of Paula N. John, dated September 11, 2003.

9. Attached hereto as Exhibit 8 is a true and complete copy of excerpts from the deposition of William Pierce Kennett, dated September 23, 2003.

10. Attached hereto as Exhibit 9 is a true and complete copy of excerpts from the deposition of Richard William Kimmerling, M.D., dated August 21, 2003.

11. Attached hereto as Exhibit 10 is a true and complete copy of excerpts from the deposition of Dr. Fitzhugh Mayo, dated September 17, 2003.

12. Attached hereto as Exhibit 11 is a true and complete copy of excerpts from the deposition of Barbara Ann McFetridge, dated September 24, 2003.

13. Attached hereto as Exhibit 12 is a true and complete copy of excerpts from the deposition of George Placke, dated August 14, 2003.

14. Attached hereto as Exhibit 13 is a true and complete copy of excerpts from the deposition of Louis Alexander Sarno, dated September 5, 2003.

15. Attached hereto as Exhibit 14 is a true and complete copy of excerpts from the deposition of Ben Leroy Schuette, dated August 13, 2003.

16. Attached hereto as Exhibit 15 is a true and complete copy of excerpts from the deposition of Joseph C. Speck, dated August 19, 2003.

17. Attached hereto as Exhibit 16 is a true and complete copy of excerpts from the deposition of Carl Creed Wilberg, dated August 29, 2003.

18. Attached hereto as Exhibit 17 is a true and complete copy of excerpts from the deposition of John David Zegarski, dated August 29, 2003.

19. Attached hereto as Exhibit 18 is a true and complete copy of News Release issued by Enron Corporation on October 16, 2001.

20. Attached hereto as Exhibit 19 is a true and complete copy of News Release issued by Enron Corporation on November 8, 2001.

21. Attached hereto as Exhibit 20 is a true and complete copy of cover pages of Enron Corporation's Form 10-K for 2000, filed on April 2, 2001.

22. Attached hereto as Exhibit 21 is a true and complete copy of cover pages of Enron Corporation's Form 10-K for 1999, filed on March 30, 2000.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2003.

Melissa J. Baily

The Exhibit(s) May

Be Viewed in the

Office of the Clerk